

FEDERAL CIRCUIT COURT OF AUSTRALIA

*AHMED v MINISTER FOR IMMIGRATION &
ANOR*

[2018] FCCA 1339

Catchwords:

CITIZENSHIP AND MIGRATION – Migration – Review of decisions – Non-protection visa (Pt 5-reviewable) decisions – no jurisdictional error demonstrated.

Legislation:

Migration Act 1958 (Cth), ss.5F(2)(c), 5CB(2)(b)
Migration Regulations 1994 (Cth) reg. r.1.15A(3), reg.1.15A(3)(a)(iii),
cl.801.221(2) of Schedule 2

Cases cited:

BLD16 v Minister for Immigration & Border Protection [2017] FCA 1400
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Applicant:	MUNEEB AHMED
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 1048 of 2017
Judgment of:	Judge Jarrett
Hearing date:	18 May 2018
Date of Last Submission:	18 May 2018
Delivered at:	Brisbane
Delivered on:	24 May 2018

REPRESENTATION

Counsel for the Applicant: Mr Travers

Solicitors for the Applicant: Chand Lawyers

Counsel for the First Respondent: Mr Byrnes

Solicitors for the First Respondent: Sparke Helmore

The Second Respondent entered a submitting appearance

ORDERS

- (1) The amended application filed on 25 January, 2018 be dismissed;
- (2) The applicant pay the first respondent's costs of and incidental to the application fixed in the sum of \$7,328.
- (3)
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 1048 of 2017

MUNEEB AHMED

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. On 26 September, 2017 the second respondent affirmed a decision of a delegate of the first respondent not to grant to the applicant a Partner (Residence) (Class BS) (subclass 801) visa. The applicant had applied for the visa on the basis of his relationship with his sponsor, Ms Terri Niha.
2. By this application, the applicant seeks judicial review of the decision of the second respondent. The grounds of his review are set out in an amended application filed on 25 January, 2018. In essence, he argues that the Tribunal took into account an irrelevant consideration when determining the review application before it or in the alternative, engaged in fact finding or reasoning (it is not clear which) which was

illogical. However, for the reasons that follow, the applicant's application must be dismissed.

Background

3. The applicant was born in Pakistan in 1988 but was raised in Dubai, United Arab Emirates between 1994 and 2010. He arrived in Australia on 11 October, 2010 on the student (subclass 573) visa. That visa expired on 30 August, 2014.
4. Ms Niha was born in New Zealand in 1980 and arrived in Australia on 30 July, 2000. The applicant and Ms Niha met through an online dating website on 22 July, 2012. They started to live together some months after their first meeting. They were married on 17 June, 2013.
5. On 9 October, 2013 the applicant lodged a subclass 801 (partner) visa. That visa, however, was refused by a delegate of the first respondent on 19 September, 2016. The delegate determined that the applicant did not satisfy cl.801.221(2) of schedule 2 to the *Migration Regulations* 1994 (Cth) in circumstances where the delegate was not satisfied that the applicant was in a genuine and continuing relationship with Ms Niha as defined in ss.5F(2)(c) and 5CB(2)(b) of the *Migration Act* 1958.
6. The applicant sought review of the delegate's decision by the second respondent. The second respondent could not make a decision favourable to the applicant on the material before it and so, convened a hearing at which the applicant could present evidence and make arguments in support of his application. The hearing occurred on 13 September, 2017. On 26 September, 2017 the Tribunal made a decision to affirm the delegate's decision then under review.
7. The Tribunal accepted that the parties were married to each other under a marriage that was valid for the purposes of the Act. It then considered other aspects of a spousal relationship as it was required to do by r.1.15A(3) of the Regulations. It considered the financial aspects of the parties' relationship, the nature of their household, the social aspects of their relationship and the nature of their commitment to each other.

8. It is the Tribunal's findings with respect to the parties' financial relationship that is the focus of the applicant's arguments in this Court. As to that, the Tribunal found that the parties had a joint bank account which they had held since July, 2013. The bank account reflected a number of small transactions. The Tribunal recorded that the statements for the banking account show that Ms Niha's salary was going into the account in 2016 but, apart from his regular earnings while driving for Uber, they do not show the applicant's income being deposited into the joint account. The Tribunal also recorded the submission made on behalf of the applicant that more recent statements in respect of the account showed more and more pooling of the parties' financial resources. The Tribunal recorded that the applicant had a personal banking account and that his income had not been deposited into the joint account. It noted that there was a lack of regular rental and utilities payments from the joint bank account statements that had been provided. The Tribunal found that there had been a joint loan taken out to pay down a credit card debt linked to the joint account and that the parties had a car registered and insured in joint names. The Tribunal noted that as at 9 November, 2016 the parties were each named as the beneficiary of the other in their respective superannuation accounts. The Tribunal recorded that it was the parties' intention to purchase a home and start a family. The Tribunal also referred to the applicant's employment history and his history of study.
9. The Tribunal accepted that the applicant and Ms Niha were recognised as having married by members of Ms Niha's family. It accepted that:
- a) the applicant has contributed to expenses of the household he has shared with Ms Niha and her family;
 - b) he opened a joint bank account with Ms Niha;
 - c) the parties have a shared liability in the form of a credit card debt linked to that account;
 - d) they have registered a car in joint names; and
 - e) they have named each other as beneficiaries in their superannuation accounts.

10. The Tribunal nevertheless, was not satisfied that the parties had in fact “pooled” their financial resources. In this regard, the Tribunal thought that the statements of transactions from the parties’ joint bank account did not show and the sponsor’s lack of knowledge about the applicant’s personal banking arrangements did not support, such a finding. In that regard, the Tribunal had found that the statement of transactions for the parties’ joint bank account from 1 July to 25 August, 2013 showed a number of small transactions of less than \$10 and a number of transfers to and from other bank accounts. In a written submission to the Tribunal the parties’ agent argued that “the more recent statements of transactions from this account show ‘more and more pooling’ ”.
11. The Tribunal observed that the statements of account for transactions from 31 December, 2013 to 30 June, 2016 also showed a number of small transactions of less than \$10 that appeared to be “one person meal type purchases” and a large number of transfers into and out of other unidentified bank accounts. The Tribunal thought that the account statements showed that Ms Niha’s salary was going into the account in 2016, but, apart from his regular earnings while driving for Uber, they did not show the applicant’s income as being deposited into the joint account.
12. The Tribunal also observed that the evidence demonstrated that the applicant maintained his own personal bank account. Ms Niha did not maintain to her own account. Ms Niha said that whilst she knew that the applicant maintained a separate account, she told the Tribunal member she did not know why or what he did with the funds that were in the account. She has, apparently, not asked the applicant why he maintains a separate bank account. She speculated that he might use it to send money to his family in Pakistan.
13. The Tribunal thought that the bank statements provided to it by the applicant and Ms Niha did not show that regular rental or utilities payments, consistent with the financing of or the running of a joint household, were made from the parties’ joint bank account. In response, the applicant explained that he and Ms Niha were living, and have in fact mostly lived since they have been together, in a shared household which, at the time of the decision included Ms Niha’s parents, her brother and sister-in-law and their two children, a nephew,

the applicant and the sponsor. The applicant told the Tribunal that the current arrangement was that Ms Niha's father pays the rent and the cost of the utilities for the household and that the applicant paid for Foxtel.

14. Ms Niha said that there was no formal arrangement for the purchase of food and other household items and that all the adults in the house apart from her mother were employed, but not all of the time. She said that everyone contributed according to whether they were employed or not.
15. The Tribunal was interested in ascertaining the parties' short-term goals and they were identified by the parties to be purchasing their own home and starting a family. Their evidence to the Tribunal, however, was that despite having married over four years ago, they had not achieved that goal, or made any advances towards it, and although they had a joint savings account as well as their joint operational account they have not made any savings. Copies of the savings account were not provided to the Tribunal.
16. The Tribunal also asked the applicant about his employment history which consisted of him working as a pizza delivery driver in November, 2010, then becoming a security officer, followed by working as a taxi driver and, at the time of the decision, being employed full time as a security officer at a shopping centre. The applicant was asked by the Tribunal member about his study commitment and how he managed that with his employment. The Tribunal member was concerned about that matter because the applicant had entered Australia on a student visa prior to the lodgement of his partner visa application. Ms Niha told the Tribunal that the applicant did not attend any courses or do any study from the time they began a relationship because he was fully occupied with the relationship and with his employment.
17. The Tribunal was not satisfied that the parties had a mutual commitment to a shared life to the exclusion of others. The Tribunal was not satisfied that the parties intend to live together or not separately and apart on a permanent basis. Accordingly, the Tribunal was not satisfied that the requirements of s.5F(2) of the Act were met at the time of the decision and therefore the applicant did not meet

cl.801.221(2)(c) of schedule 2 of the Regulations. The decision under review was affirmed.

The grounds of review

18. Ground one of the application for review before this Court is that:

The Tribunal engaged in conduct which amounted to jurisdictional error when assessing whether there was a genuine and continuing relationship in that it considered an irrelevant consideration, namely, in order to satisfy the definition of spouse it was necessary for the applicant and/or the sponsor to “pool” their financial resources.

19. The difficulty with this ground of review is that it mischaracterises what the Tribunal did when it determined the review. It is as well to set out the brief operative parts of the Tribunal’s decision:

37. The Tribunal acknowledges that the motive of obtaining a migration outcome does not preclude the possibility of a genuine relationship, and has weighed the evidence in favour of the parties being in a genuine spousal relationship at time of decision against evidence that they are not.

38. The Tribunal accepts that the parties are recognised as having married by members of the sponsor’s family and that members of the sponsor’s family and friends and colleagues support the applicant’s Partner visa application. The Tribunal accepts, on the advice of the applicant at hearing, that he has informed his parents that he has married in Australia and applied for permanent residence through his Partner visa application. The Tribunal is not satisfied and no evidence was provided that the parties are recognised and related to as being in a genuine, long-term spousal relationship by members of the applicant’s family in Pakistan and the United Arab Emirates.

39. The Tribunal accepts that the applicant has contributed to expenses within houses he has lived in with the sponsor and her family; that he opened a joint bank account with the applicant; that the parties have a shared liability in the form of credit card debt linked to this account; that they have registered a car in joint names; and that they have named each other as beneficiaries in their superannuation accounts. The Tribunal nevertheless is not satisfied that the parties have in fact pooled their financial resources. The statements of transactions from the parties’ joint bank account do not show, and the sponsor’s lack of knowledge

about the applicant's personal banking arrangements does not support, such a finding.

40. The Tribunal accepts that the parties have known each other since 2012 when the applicant established contact with the sponsor through an on-line dating website. The Tribunal notes that they have sent each other Birthday and Valentine's Day cards in which they declare love and commitment to each other. The Tribunal also notes that the parties have made no progress towards the short-term relationship goals that they claimed to have at the time of application: to establish a household of their own and to start a family.

41. Having considered r.1.15A(3) matters and weighed and balanced the evidence, the Tribunal is not satisfied that the parties have a mutual commitment to a shared life to the exclusion of others. The Tribunal is not satisfied that they intend to live together or not separately and apart on a permanent basis.

42. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221(2)(c).

20. On a proper reading of the Tribunal's decision, the Tribunal did not approach the case on the basis that in order to satisfy the definition of spouse it was necessary for the applicant and the sponsor to pool their financial resources. The reasons, albeit brief, of the Tribunal indicate that the pooling of financial resources was treated in the way the regulations required it to be treated – as one of a number of matters to be taken into account.
21. The Tribunal, in its reasons for decision, referred to reg.1.15A which provides, for the purposes of subsec.5F(3) of the Migration Act, arrangements for the purpose of determining whether one or more of the conditions in paragraphs 5F2(a),(b), (c) and (d) of the Act exist. One of the matters to be considered according to reg.1.15A(3)(a)(iii) is “the extent of any pooling of financial resources, especially in relation to major financial commitments”.
22. Accordingly, to the extent that the applicant argues that the extent of the pooling of financial resources between the applicant and Ms Niha, if any, was irrelevant to the decision to be undertaken by the Tribunal, the argument cannot be sustained. That matter was plainly a matter

which was relevant to the Tribunal's consideration by reason of reg.1.15A(3).

23. If the Tribunal had approached the matter on the basis that it was necessary for there to be a pooling of financial resources before the Tribunal could find that the relevant spousal relationship existed, the Tribunal would have fallen into error. But that is not what the Tribunal has done. The Tribunal did not consider that it was *necessary* for there to be a pooling of the parties' financial resources for there to be a finding that the parties were in a spousal relationship for the purposes of the Act. It was but one matter taken into account by the Tribunal albeit, a matter which the Tribunal ultimately considered significant. The Tribunal referred to other matters which the Tribunal considered told against the case contended for by the applicant, namely:

- a) *The Tribunal is not satisfied and no evidence was provided that the parties are recognised and related to as being in a genuine, long-term spousal relationship by members of the applicant's family in Pakistan and the United Arab Emirates at [38] of the Tribunal's reasons;*
- b) *The Tribunal also notes that the parties have made no progress towards the short-term relationship goals that they claimed to have at the time of application: to establish a household of their own and to start a family. at [40] of the Tribunal's reasons.*

24. Although not articulated in the grounds of review, the written submissions delivered on the applicant's behalf for the purposes of the hearing before me raised two other matters said to go to the first ground of review. The applicant argues that because the only adverse finding against the applicant and Ms Niha was the finding that they had not pooled their financial resources and that there were no other adverse findings about any of the matters required to be considered by reg.1.15A(3) of the Regulations, the Tribunal reached a conclusion which was illogical or unreasonable. Further, the applicant appears to argue that the Tribunal did not take into account a relevant consideration namely that both of the parties' wages were paid into the joint account, statements for which were given to the Tribunal and that it had failed to consider "all of the relevant transactions in" the joint account.

25. In his written submissions, counsel for the applicant identifies a number of transactions said to be supportive of the notion that the parties had pooled their financial resources and which indicated the sharing of expenses and incomes. However, the applicant's argument fails to observe the distinction between a relevant consideration for administrative law purposes and a matter of fact or assertion of fact or evidence put forward in support of an assertion of fact. The relevant consideration here was the financial aspects of the relationship including the matters adumbrated in reg.1.15A(3)(a) of the Regulations. The factual matters to which the applicant now draws attention are the facts, assertions of facts and evidence put forward by the applicant and to some extent Ms Niha in support of his case in respect of that relevant consideration. His complaint, in truth, is not that the Tribunal did not take into account a relevant consideration, but rather that it did not use the evidence put forward by the applicant and his sponsor in the way in which the applicant contended it ought to be used. There is no jurisdictional error in the approach taken by the Tribunal to those facts.
26. To the extent that the applicant's written submissions also contend that the Tribunal's ultimate conclusion at [39] of its decision was illogical, the argument cannot succeed. There was no finding made by the Tribunal to which a label of "illogical" could be attached in the relevant sense. The Tribunal expressed its ultimate conclusion as a lack of satisfaction on its behalf of the matters about which it needed to be satisfied for the review to succeed. There were a number of matters about which the Tribunal was not satisfied. I have set them out above.
27. In my view, the applicant does not establish that the Tribunal's ultimate conclusion was illogical or unreasonable because the applicant does not establish the Tribunal's ultimate conclusion was based on a single finding that the parties had not "in fact pooled their financial resources".

Ground Two

28. Ground two argues that (errors in the original):

The Tribunal engaged in conduct which amounted to jurisdictional error in that its decision that the parties did not have a mutual commitment was illogical.

29. In *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, the test for illogicality in administrative decision making was described by Crennan and Bell JJ as follows:

130. In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

131. What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

30. Moreover, a jurisdictional error might arise as a result of an illogical, irrational or unreasonable finding of fact which is "on the way" to a final conclusion: *BLD16 v Minister for Immigration & Border Protection* [2017] FCA 1400 at [37] and the authorities therein cited.

31. The applicant submits that no reasonable Tribunal would have concluded that the applicant and the sponsor did not have a mutual commitment to a shared life with each to the exclusion of others or that they had not pooled their financial resources. However, in my view having regard to the findings made by the Tribunal and the matters about which it was not satisfied, it was plainly open to the Tribunal to conclude that the applicant and sponsor did not have a mutual commitment to a shared life with each other to the exclusion of others.
32. The applicant argues that the consideration by the Tribunal of the short-term goals the parties claimed to have set for themselves and their failure to achieve those short-term goals such as purchasing a house together or conceiving children was not a requirement of the definition of spouse. The applicant suggests that a consideration of such factors “could expose the Tribunal to a criticism of considering irrelevant facts”. However, such a submission misunderstands the operation of reg.1.15A. By reg.1.15A(2) if the Minister is considering an application for a visa of the type applied for by the applicant here, the Minister “must consider all of the circumstances of the relationship, including the matters set out in subreg.(3)”. Thus, the matters prescribed by reg.1.15A(3) are mandatory considerations for the Minister. But they are not the only considerations. The Minister must consider all of the circumstances of the relationship *including* those set out in reg.1.15A(3). There is nothing in reg.1.15A or in the definition of spouse in s.5F of the Act which would preclude the Tribunal from considering the matters which it considered in the present application. Indeed, a consideration of those matters might be seen to be mandated by reg.1.15A(2).
33. As the first respondent submits, the Tribunal did not find that the applicant and the sponsor did not have a commitment to a shared life together to the exclusion of others. Rather, it expressed that it was not satisfied that the parties have a mutual commitment to a shared life to the exclusion of others. There is plainly a difference. The Tribunal set out its reasons for concluding that it was not satisfied that the parties had a mutual commitment to a shared life to the exclusion of others. Other Tribunals might have reached a different conclusion on the material before this Tribunal. But that is nothing to the point.

34. The applicant argues that the Tribunal paid no attention to the difficulties that would face the applicant and the sponsor from starting their own household as they suggested they had wished or that it did not pay due regard to the medical evidence before the Tribunal which the applicant suggests explains the failure of the parties to start a family. However, the Tribunal's reasons for decision contain reference to that material including the employment activities undertaken by the applicant and the medical difficulties experienced by the sponsor. There is nothing remarkable about the way in which the Tribunal dealt with that material.
35. There is no basis upon which to conclude that the Tribunal's conclusion in this matter was illogical in the sense argued for by the applicant.

Conclusion

36. In the circumstances, the application does not demonstrate that the Tribunal's decision is affected by jurisdictional error and the amended application must be dismissed with costs.

I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Judge Jarrett delivered on 24 May, 2018.

Date: 24 May, 2018